No. 3989

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

EVA GAY et al., minors, by guardian ad litem,
Appellants,

vs.

H. FOCKE et al.,
Appellees.

REPLY BRIEF FOR APPELLANTS

Upon Appeal from the Supreme Court for the Territory of Hawaii.

HENRY HOLMES,
H. EDMONDSON,
WARREN GREGORY,
Attorneys for Appellants.

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I.

Scope of Review.

LIFE TENANTS, APPELLEES, CONTEND THAT AN APPEAL TO THIS COURT FROM THE FINAL (AND ONLY) DECREE OF THE SUPREME COURT OF HAWAII DOES NOT BRING UP FOR REVIEW ALL PRIOR DECISIONS AND DECREES OF THE COURTS BELOW THAT WERE NOT FINAL.

We disagree with this contention. On the first appeal the Supreme Court of Hawaii remanded the entire cause, not part of it, and did not enter any decree (Record 63, 66, 67). Even if it had, there can be no appeal from part of a decree (*Tax Assessor v.*

Makee Sugar Co., 18 Haw. 267). It is fundamental that an appeal from the final decree in a cause brings up for review so far as appellants are prejudiced the entire proceedings in the courts below. The point is conclusively determined against this position of appellees by the decision of this court in *Rumsey v. New York Life,* 267 Fed. 554, cited in our opening brief.

II.

THE DECISION OF THE COURT BELOW THAT THE WILL IS NOT AMBIGUOUS IS CONCLUSIVE.

Appellees contend that the use of the word "rents", in the expression, "rents, income issues and profits" in the will, creates an ambiguity; and, therefore, they seek to bring into the case evidence of facts and circumstances surrounding the testator, and the nature of his estate.

On page 9 of life tenants' brief (1) (a) they say, "and using the proceeds of the whole trust estate to maintain his wife and children". There is no evidence on this point one way or another. On page 22, life tenants' brief says:

> "Did he intend to prescribe a course for his trustees, different from what he was himself pursuing, while they should 'carry on' his business?"

The evidence does not show what course testator pursued; and if it did, testator unquestionably could tell his trustees to pursue a different course. It was

his property, he could do as he liked with it; but his trustees must do what the will tells them, not as they like, it is not their property. On the same page of life tenants' brief it is asked: "Without those rents being *used up* as they came in could he have either run the business *or* supported his family?" The evidence does not say, we can only surmise—perhaps he could not, perhaps he could, else he would not have left any other property in addition to the leaseholds. Life tenants further ask, "And without using them up did he expect his trustees to do so?" The will answers this in the affirmative by giving only the income for the support and maintenance of the children.

Any question of considering surrounding facts and circumstances or the nature of the estate has been finally determined and decided against appellees by the court below. They have not appealed and cannot, therefore, contend that the decree or decisions of the court below are wrong.

Fitchie v. Brown, 211 U. S. 321;
Castle v. Irwin, 25 Haw. 786.

They are confined to supporting and defending (not attacking) the decree and decisions. The court below said:

> "From the fact that the will provides for *rents* to be paid to the life tenants and the further fact that the testator had no real estate the life tenants argue that the word 'rents' could apply only to leaseholds and that the obligation to convert is thereby negatived. They cite *Goodenough v. Tremamondo,* 2 Beav. 512 (48

Eng. Rep. (Repr.) 1280). There the will, which was not *executed* so as to pass real estate, after bequeathing specific legacies, provides: (quoting) * * * Other cases are cited in support of this contention but this one seems to be the most nearly in point of any.

"The case at bar is distinguished from Goodenough v. Tremamondo primarily by the fact that the will in that case was not *executed* so as to pass real estate, while the will in the case at bar was not so restricted, although the testator owned no real estate at the time of his death. Under these circumstances we cannot say that the word 'rents' refers to anything more than the real estate which the testator might have acquired between the making of his will and his death and which would have passed by his will *in the form he made it* had he acquired any.

"Our conclusion as to the effect of the use of the word 'rents' is supported by the decision in *Pickup v. Atkinson,* 4 Hare 624 (67 Eng. Rep. (Repr.) 797), where, * * * the testator bequeathed the 'rents and profits, dividends and interest' of all the residue of his property to his wife for her life with gift over of the whole of the residue after her decease to other persons, and there was no freehold. The Vice-Chancellor, in discussing the question, said: 'If the use of the word 'rents' in one case, with reference to leaseholds not specifically bequeathed, is to be taken as sufficient evidence that the tenant for life of the residue was intended to enjoy the leaseholds in specie, I do not know how to stop short of the conclusion that any other word by which income may be described is to have the same effect with reference to the property in respect to which it is paid * * *'."

See also other cases cited (Record 57, 59).

The Gay will actually speaks of *real* estate: "I hereby give, *devise* and bequeath * * * all my estate real personal or mixed". The will in itself is complete. As stated on page 17 of our original brief, the word "rents" is satisfied by a reference to the word "real" used in the will—"all my estate real personal or mixed * * * to pay the rents income issues and profits arising from and out of my said estate". While appellees refer to surrounding facts and circumstances and the condition of testator's estate, they *do not* attempt to explain why the testator spoke in his will of "real" estate,—they say he had none when he made his will. He could then only have meant to refer to any real estate he might acquire before he died. There is no ambiguity in the (language of the) will, but appellees seek to create an ambiguity by a reference to the property the testator happened to have when he died. The expression "rents income issues and profits" is the most customary way of denoting *income* as distinguished from *capital* or *corpus.*

As elsewhere stated, the appellants here contend that the decision of the court below as to the application and meaning of the term "rents" is conclusive upon this court since no appeal was taken from that judgment by the present appellees, but assuming that this court may now consider this question, the decision of the court below is clearly right. If the testator intended to devise to the life tenants the

rents *eo nomine* then in effect he devised to them his entire estate, and the distinction made manifest in the will between corpus or capital, and income ceases to exist. To sustain the position now claimed by appellees on this point this court must hold that the testator intended a *specific* and not a *general* legacy or devise. In this view the expression "all my estate, real, personal or mixed", etc., is an idle one, and must be ignored. We assume that it is elementary that a testator must be deemed to intend "equality among the objects of his bounty" and that "a legacy is presumed to be general unless it clearly appears to be specific".

40 *Cyc.*, p. 1872 and cases cited.

With reference to testator's dying condition when he made his will, the Circuit Judge said of the evidence:

> "the purpose (of its introduction) being to show that the will here in question was made by him with reference only to the estate which he then already had and was disposing of, and, therefore, that in using the word 'rents' in the clause 'rents, income, issues and profits arising from and out of said trust estate', when he did not then own any real estate, he meant 'rents' from both Ookala and Mokuleia leases rather than to rents from any real estate he might possibly yet acquire before his death. This was objected to by the guardian ad litem. * * * I hold, however, that it would not affect the question of the duty of the trustees to have converted the Ookala lease as has now been directed by the Supreme Court" (Record 70, 71).

It would not affect the Mokuleia lease either, because the whole estate was given to the trustees upon trust by the most general words. On the second appeal the Supreme Court of Hawaii did not consider these surrounding facts and circumstances, but appellees did not ask for a rehearing or appeal.

Appellees invoke rules of construction and cite cases about other wills. Such citations might be indefinitely multiplied. The court below said:

> "The testator's presumable intention is that there shall be equality of enjoyment where there are no directions as to how the estate shall be enjoyed. It is the intention *presumed by law* in the *absence* of any *contrary intention expressed* by the testator, and being only a presumption of intention, it must give way to any intention expressed by the testator. When once you have arrived at the intention of the testator you must give effect to it notwithstanding the rule in Howe v. Dartmouth. Any other conclusion would be in conflict with our own decisions." Citing authorities (Record 56, 57).

There is no doubt about the plain *expressed* "purposes" in Gay's will. It is only in case of doubt or ambiguity that surrounding facts and circumstances are considered.

Nearly every will differs in some respect from another. The first thing to do is to read the will and see what intention the testator expressed. In all the cases cited by life tenants and the trustees, there is not one in their favor with expressions similar to those in Gay's will, where the will con-

tained a direction, that the trustees should carry on the testator's business, "so long as it can be done so profitably, and without loss" and empowering them in their discretion to sell when such a course would "be beneficial and inure to the benefit of or increase the trust estate created under this will". We are not concerned with other wills, but with Gay's will.

The method of dealing with the proceeds of the business which appellees say should be adopted, would, if applied, destroy the capital of every business which consisted of personal property. If a railroad, an engineering, a merchandise, or a ranching or any other business paid out all the proceeds received, without replacing rolling stock, etc., machines, etc., stock in trade, etc., or live stock, or creating a reserve, what would become of the business or its capital? It could not be carried on "profitably, and without loss" as testator said should be done. Depletion or loss of capital is the worst kind of loss imaginable. Testator not only says the business is to be carried on "profitably", but he also says "without loss". If he meant, as appellees say he meant, all the proceeds were to be paid out, how could he mean the business to suffer anything else but loss? Appellees don't explain, nor can we. They fail to observe the difference between profit of the nature of income and receipts. Receipts are not all income or profit properly so called.

Appellees argue that because the rents from the sub-leases of testator's property were comparatively small when he died and for some years thereafter, he must have meant his wife and children to receive them all. Would the same will mean one thing if the rents totalled only $200.00 a year, and another thing if they totalled $20,000.00 or $200,000.00 or $2,000,000.00 a year? Where would the line be drawn, when the rents were, let us say, $1,000.00 or $10,000.00 or $100,000.00 or $1,000,000.00 or any other sum? What the trustees should have done, if they did not sell the leases, was to put a value on them and pay the life tenants interest on that value or treat the rents as part income and part capital. Where the *will is not ambiguous* the condition of the estate or property cannot be invoked to, either,

(a) Explain the intention, or

(b) Control the construction or extent of devises therein contained (see cases cited in our first brief, pages 14, 15).

We know no law that prevents a man with a small estate creating a trust. This right is not restricted to persons owning large estates.

The amount and condition of the estate cannot be used to *create* doubts about the meaning of the will. The will comes first, and if its meaning be plain, the property must be dealt with accordingly.

The case should not be confused by injecting into it surrounding facts and circumstances such as the dying condition of the testator and the nature of his property. The case must be simplified and clarified by cutting away dead wood and "dead issues"—to borrow life tenants' expression. If the court will take Gay's will and read it without the influence of extraneous matter, there can be no doubt of its meaning. Having determined that meaning, its application to the property is simple. The citation on life tenants' brief, pages 73-74 from *In re Hollebone* (1919), 2 Ch. 93, shows one simple way of applying it.

Appellees contend that as Gay knew, when he made his will, he was going to die soon, his will should be read differently from the way he made it, and with the facts of approaching death and the condition of his estate in mind. If a man lived a day, two days, three days, a week, a month, a year, three years, after making his will knowing he had some incurable disease and must die soon, would the court give different meanings to the same words according to the time which elapsed before he died? Circumstances such as his property may change from time to time between the time the will is made and death but the will does not change. In Hawaii a will speaks from the death of the testator, and if it be complete on its face, as is Gay's will, it is the only source from which the intention of the testator may be ascertained.

The creation of the trust, and the provision that the *trustees* should "manage, conduct and carry on" the business of ranching and stockraising at Mokuleia, is conclusive proof that the testator did *not* intend to devise to the life tenants any property in specie or that the life tenants were themselves to carry on the business.

There appears then no necessity for a reference to any facts or circumstances de hors the will. The document is clear and singularly free from ambiguity and, therefore, must speak for itself. But if life tenants be right in their contention that such reference to surrounding circumstances may be had, then in one aspect at least, their theory of this appeal is demolished, for if we assume that Gay drew his will having in mind the then condition of his property, we must further assume that he knew that these leasehold interests would expire, the one in 1908 at the latest, and the other in 1934. He must have known furthermore that his children were then very young, and in the natural course of events would survive for a very considerable period, the expiration of the term of the longer lease. Under such circumstance he did not intend that the children should be paid all these rentals for as long a time as any of them should live, knowing that there would be no rentals for a considerable portion of such period. If the word "rentals" has the specific meaning claimed by appellees there must result a pronounced hiatus in the general scheme of the will.

That the testator did not intend to give to the life tenants the corpus of his estate is made manifest again by the care with which he has employed the language providing for the distribution of the income. The testator did not say that the income must be paid to the life tenants; on the contrary, he directed his trustees, so long as his wife lived, to pay the rents, etc., to her, for the support of herself and also "for the support, maintenance and education of my children". After the death of the wife, the trustees are directed to pay, not the rent, income, etc., directly to the children, but for the "support and maintenance of my children" etc.

So that there is not even an unrestricted bequest of the income only. The children may not do with this income as they see fit. They may not use it for investment purposes. It is only intended for the "support and maintenance" of the sons, and the "support, maintenance and education" of the daughters. It is not necessary now to consider whether or not the children are entitled to the entire income, although it may exceed the amount reasonably necessary for their support, maintenance and education. The point here made is that the use of the income is limited by the will and the children are not entitled to such income for all purposes. This expression "support and maintenance" is mentioned three times. The income is to be paid for that purpose as long as the children

shall live, not until the expiration of the leaseholds, so that the extent of the bequest is measured by the life or lives of the children, and not by the character of the property so devised.

If, as appellees contend, the proceeds are corpus if the lease be sold, but income if it be not sold, then the "trust estate" will be benefited by a sale at any price, even one dollar, because it is manifest that under this view the lease and all income therefrom will go to the life tenants, and the trust estate will be constantly diminishing so that by 1934 it will be reduced to nothing. The provision directing the trustees to carry on the business "profitably and without loss" and the express power of sale given to the trustees to be exercised when, in their discretion, a sale would be of "benefit and inure to the benefit of or increase the trust estate created under this will", both included in one paragraph, as almost the last thought in the testator's mind in making his will, seem to compel the conclusion that the testator was solicitous for the maintenance and increase, if possible, of the trust *estate,* and that it was furthest from his mind to have the trustees take such a course of action as must inevitably diminish and ultimately destroy that trust estate instead of increasing it.

III.

CONSIDERATIONS ARISING FROM THE CREATION OF THE TRUST ESTATE.

Throughout the record of the case below and the briefs, but little, if any, reference has been made to the fact that the testator devised and bequeathed to two trustees all of his estate for certain uses and purposes therein named.

The testator did not devise his estate to his wife and then to his children, with the remainder over to his grandchildren, nor did he use any such terms as requesting the trustees to pay over the "residue" or "what remains of said trust estate after the death of the prior taker".

The only purpose of creating this trust at all was obviously to preserve a distinction between "estate" and "income". From the standpoint of appellees these two terms mean the same thing since all the estate will necessarily be used up in paying the income. From their point of view, therefore, this will has the same effect as if it said that the testator gave all of his estate to his wife with the residue over to his children, and upon the death of the longest lived of such children, any residue remaining to the grandchildren. They must say that the expression, "rents, income, issues and profits arriving from and out of my said estate", is synonymous with the expression, "my estate".

The mere fact that this trust was created, evidences an intention on the part of the testator to *preserve* the corpus of his estate for a residuary devisee or legatee; otherwise why was a trust created at all?

That the creation of such a trust was one of the primary purposes of the testator is shown by the care taken to provide for the appointment of a successor trustee, in the event of the death, resignation or other incapacity of those originally appointed.

The testator has made a clear distinction between his "estate" and the "income arising therefrom". This distinction could not have been more clearly emphasized since in the case of each life tenant the same term is used, that is to say, he gives to his two trustees all of his estate, real, personal or mixed, but he does not authorize the trustees to convey such *estate* to his wife. To the contrary he directs them

> "to pay the rents, income, issues and profits arising from and out of my said estate to my wife for the support of herself, etc."

After the death of the wife the intention of the testator to convey, not the estate, but so much of the income resulting therefrom as might be necessary for the support of the children, is again shown by express language. It is only in that portion of the will which deals with a period of time when all

of the children of the testator shall be dead, that the *"trust estate"* shall be conveyed by the trustees. After the death of the wife, and all the children, the testator, *for the first time* directs his trustees to convey the trust *estate*. Up to this point he desired the "estate" to be owned and controlled by his trustees and not by his wife or his children.

This distinction between corpus and income is made crystal clear by the direction to the trustees to pay the share or portion *of the income* belonging to any child, to the heirs of such child so dying; that is, the wish was clearly expressed that after the death of *all* of the children, the trust estate and all additions or increases thereto should go to the grandchildren, but upon the death of *any one* of the children, his or her proportionate share of the *income only* should go to the heirs of such child so dying.

It is submitted that it is not possible to draw an instrument which would more clearly indicate the intention of a testator that a distinction be made between the principal or corpus of his estate and the income resulting from that estate. He obviously did *not* intend that the rents, income, issues and profits arising from his estate should have the same meaning as the term his "estate"; otherwise the whole scheme of the will, the creation of the trust and the directions to the trustees is made an idle

thing, and it could have been written in these few lines:

> "I devise all my property to my wife as long as she shall live, with remainder over to my children, and after the death of the longest lived of them, to my grandchildren."

Such was *not* the intention of the testator.

It has been urged repeatedly that it is impossible to believe that the testator intended to give to his children only the income from his estate and preserve for his grandchildren yet unborn, the corpus of the estate. This argument ignores the creation of the trust. It is obviously the intent of the testator that neither his wife nor his children should consume *all* of his estate, and so he appointed trustees. The children benefit by any increase of the trust estate to the extent that the income resulting therefrom increases,—in other words, the testator did not wish his children to *consume* his entire property. If he had so desired he could have stated that the children should not take any part of the corpus of his estate until they respectively reached a certain age, and such limits would not violate the rule against perpetuities so long as provision was made for a second taking in the event of the death of any one of the children. There is no more common provision than this in wills. There is, we submit, no provision of law which prevents a testator from *preserving* the corpus of his estate for the benefit of his descendants so long as the rule against per-

petuities is not violated. The testator here evidently did not wish his children to receive all his estate during their lifetime, but he wished, by creating this trust, to build up a fund which would, as time went by, increase, and thereby result in a greater income for the children, as well as benefit the grandchildren.

If the testator did not wish any of his children to inherit his property, he had a perfect right to so provide. That such a will might be considered "unnatural" is not to declare it invalid. The testator here did not go to any such extent. On the contrary, it is demonstrable that the argument here made for the maintenance and preservation of the corpus of the estate is for the actual benefit of the life tenants as well as of the remaindermen. If the value of the Mokuleia leasehold is amortized by the same method as was the Ookala leasehold, and the date of such conservation be fixed either at the time of the death of the testator, or in 1906, the value of the trust estate will be very considerable, and the children will benefit by such increase since they will be entitled to the income resulting therefrom. By reference to the record (pp. 127-128), it will be noted that the rentals from this lease from the date of the death of the testator down to and including the year 1919, exceeded in gross amount, $281,000.00, and in net amount, $248,000.00. The average rental for the last five years has exceeded $16,000.00 per annum. It is, of course, impossible to be certain

as to these rentals in the future, but if the average for these five years be continued for the remaining 15 years after 1919, of the lease, it will result in a sum in excess of $200,000.00 being added to the aforesaid $248,000.00 as corpus of the estate, after deducting the rental under the head lease and administration charges. An income at even approximately 6% on the aggregate of these sums will yield a substantial provision for the life tenants, and this will continue as long as the longest lived of them shall live, whereas if all the income be now paid to the life tenants, nothing will be left to them after 1934. Is it wiser that the children get $16,000.00 for say eleven years for their support only or 6% on this investment *for life* and for any purpose? As a practical matter we assert that there can be no question as to the ultimate benefit to all parties concerned by such a permanent investment, since it must be continually borne in mind that the children have a right to the income until the death of the longest lived of them, whilst the revenue from the leaseholds must inevitably cease in 1934. If this trust estate were incorporated, it is obvious that recognized methods of bookkeeping would require the present directors to set up a depreciation fund for the benefit of future stockholders, and this is, we think, the universal practice with corporations whose assets consist of wasting properties, such as mines, oil wells, etc.

IV.

THE SALE BY THE TRUSTEES OF THE RANCH AND STOCK-RAISING BUSINESS AT MOKULEIA IN 1906 COMPELLED THE TRUSTEES TO RE-INVEST AS OF THAT DATE ANY MONEY REALIZED FROM SUCH SALE IN PERMANENT SECURITIES.

In the interesting and learned opinion of the court below (61), the direction of the testator as to the Mokuleia lease is considered, and it was there held that the directions of the trustees to carry on the business of ranching on this leasehold interest, negatived any intention of a conversion of the property as of the death of the testator. For this reason alone it was held that the doctrine of *Howe v. Earl of Dartmouth* would not apply in this particular respect.

The anonymous conclusion is, therefore, reached that although there is no power of sale given to the trustees of the Ookala leasehold, it should be considered as having been sold as of the death of the testator, while the Mokuleia leasehold which *is* authorized to be sold by the trustees, should not be considered as so sold.

The record here shows without dispute that in 1906 the trustees elected to consider that the business of ranching and stockraising at Mokuleia could no longer be done profitably and without loss, and the trustees at this time did elect to retire absolutely from such business. For convenience we here repeat the language of the will in this case:

> "It is my wish and I hereby direct that my said Trustees or their successors or successor,

shall manage, conduct and carry on the business of ranching and stock-raising at Mokuleia on the Island of Oahu, so long as it can be done so profitably, and without loss; and I hereby empower them or their successors or successor at any time when in their discretion they think that a sale of all the property of said Mokuleia, would *by reinvestment* of the money realized from such sale of said property be beneficial and inure to the benefit of or increase the Trust Estate created under this will, to sell and convey the said property at Mokuleia free and barred of the Trust created by this will."

The record states (pp. 123-4):

"The family continued to reside at Mokuleia until Mr. Gay died, in April, 1895, when the children went to Honolulu. After Gay's death the trustees continued to carry on the testator's ranching business along the same general lines as he had done in his lifetime, until some time in the year 1906 when the livestock and movable assets used in connection with the ranching business were sold by the trustees, realizing $4,065.00 net. This sum has since been invested and held by the trustees as corpus of the estate. In the meantime, on December 9, 1898, a portion of the Mokuleia lease containing an area of about 800 acres was subleased by the trustee to B. F. Dillingham for the balance of the term of the head lease at a rental of five per cent of the sugar (or the proceeds thereof) grown thereon. This sublease was assigned to the Waialua Agricultural Company and on July 2, 1902, the trustee subleased to that Company for the remainder of the term of the head lease 65 acres more of the Mokuleia lease at a like sugar basis rental. In 1906 when the ranch stock was sold the rest of the Mokuleia lease was subleased by the trustees to others for fixed

annual rentals and for the remainder of the term of the head lease. All of the Mokuleia lease is now sublet."

The statement, "until Mr. Gay died, in April, 1895", should be, "until *Mrs.* Gay died, in April 1895."

It is submitted that in any event the value of the subleases for the remainder of the term of the head lease after 1896 must be amortized in the same way as the sum of $4,065.00 received from the sale of the live stock and movable assets, and that this sum should be held as corpus of the estate.

Since the subleases were made for the whole term of the head lease they were in effect a sale or assignment thereof.

Washburn on Real Property, 5th Ed., Vol. I, p. 541;

Cook v. Jones, 28 S. W. Rep. 960;

Hollywood v. First Parish, 78 N. E. Rep. 124;

Stover v. Chasse, 26 N. Y. Supp. 740;

Gulf, etc. Ry. Co. v. Settegest, 15 S. W. Rep. 228.

The court, therefore, has a situation in which it appears that the trustees did, in compliance with the instructions of the testator, dispose of the business of ranching and stockraising, and sell all the property connected with said leasehold interest. They were empowered, in the event of such sale, to "reinvest" the money realized therefrom.

This re-investment must be made with a view to the interest of the life tenants and also the remaindermen. We submit that there is no reason in the position that the trustees should invest the money from the sale of live stock in permanent securities, and not take the same course with the moneys realized from the sale of the leasehold interest.

If, therefore, this court should concur in the decision of the court below to the effect that the direction to

> "carry on the business of ranching and stock-raising at Mokuleia discloses an intention on the part of the testator that this leasehold interest should not be converted as of the date of his death",

nevertheless the generally accepted rule as to the duties of trustees in the investment of trust funds became applicable at once when the trustees elected to go out of the business of ranching and stock-raising. The testator empowered his trustees to sell this particular leasehold interest when a re-investment of the money realized from such sale of said property (would) be beneficial and inure to the benefit of or increase the trust estate created under this will. This *re*-investment, which must, as far as possible, preserve an equality among all of the objects of the bounty of the testator, can not be of such a character as would preserve the corpus for the benefit of the life tenants only. The moneys to be thereafter realized from the sub-leases, which were in effect assignments, have the same trust

marks upon them as would deferred payments. If the trustees had sold the cattle for a certain sum, payable in installments, it would not be asserted that these installments, as they were paid, should be turned over *in toto* to the life tenants, because this would clearly be a division of the corpus of the estate, nor would such assertion be made if the trustees, instead of making sub-leases, had in 1906 sold the leasehold interest in question, upon installment payments. In either event, these installments would be capital or corpus and not income.

Thus the question is as to the general duty of trustees in the investment of trust funds. This proceeding was instituted by the petition of the trustees praying that they be instructed by the court as to their duties in the premises. The court in passing upon this petition acts as a court of chancery and has a wide discretion within the fixed boundary lines that the intention of the testator must be carried out as far as possible and the rights of all the recipients of his bounty preserved. The fact that a conversion of the estate into permanent securities could not be made as of the time of the death of the testator, does not militate against the argument here made. If it be to the benefit of all parties concerned that the time of the conversion should be postponed, this does not rigidly foreclose the principle of *Howe v. Dartmouth.*

In Re Hollebone, 2 Ch. 93;
Gibson v. Bott, 7 Ves. 36;
Furniss v. Cruikshank, 130 N. E. R. 625.

This court has now before it the question of the validity of the judgment of the court below. The terms of the will seem to be clear in drawing a distinction between capital and income and the court below so decided. The measure of this appeal is the effect of the decision as concerns the Mokuleia leasehold interest. It is submitted that when the trustees carried out the provisions of the will and ceased to continue the business of ranching and stock-raising upon this leasehold interest, at least from that time forward it was their duty to re-invest the future payments in some form of permanent securities for the benefit of the entire estate which included the interest of the life tenants as well as of the remaindermen. It is a simple case of a decision as to the character of a re-investment which should inure to the benefit of and increase a trust estate. It needs no argument to prove that a trust estate cannot be increased when its entire corpus is being annually consumed.

Dated, San Francisco,
June 25, 1923.

Respectfully submitted,
HENRY HOLMES,
H. EDMONDSON,
WARREN GREGORY,
Attorneys for Appellants.